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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 250

CORNELIUS J. COLLINS, ET. AL.,
Petitioners,

vs.

LESTER L. SEIFRIED,
Respondent.

SHERIDAN VIEW BUILDING CORPORATION,
Debtor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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B. Where the dominant creditor is a fiduciary by reason of being attorney for the indenture trustee in the state court foreclosure, his conduct must be on a higher level than that of persons deal-	

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C. In the Marine Harbor case as distinguished from the present case, no conflict existed between creditors and the debtor did not sustain the burden of establishing good faith which federal statutes place on a petitioner. So far as the "interests" of stockholders were concerned they would not be denied in the State Court any benefits, advantages or protection which Chapter X afforded, as it was conceded the debtor was insolvent. In the instant case a conflict exists among the only class of creditors, and the state court procedure was inadequate as compared with Chapter X to protect all creditors, and the prior foreclosure proceedings is controlled by a person who with selfish interest could be guilty of abuse..... 12

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners Cornelius J. Collins, Jessie Mae Collins, Helen S. Milis, P. A. Caswell and Stanley Lapin respectfully pray this Court for the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review an order of that Court entered on June 6, 1945, reversing an order of the United States District Court for the Northern District of Illinois,

Eastern Division, which approved a creditor's petition for reorganization of the Debtor corporation as filed in good faith and named a Trustee.

Opinion Below.

The opinion of the Circuit Court of Appeals is not yet officially reported but is contained on pages 116 to 119 of the record.

Jurisdiction.

The order of the Circuit Court of Appeals was entered on June 6, 1945. No petition for rehearing was filed. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Section 144 of Chapter X of the Bankruptcy Act provides if an answer be filed by a creditor controverting any of the material allegations of the petition the Judge shall determine the issues presented by the pleadings and enter an order approving the petition if satisfied that it complies with the requirements of said chapter and has been filed in good faith and that the material allegations are sustained by the proofs, or dismissing it, if not so satisfied. Section 146 provides that without limiting the generality of the term "good faith", a petition shall be deemed not to be filed in good faith if "(4) a prior proceeding is pending in any Court and it appears that the interests of creditors and stockholders would be best subserved in such prior proceeding."

The question presented is:

Whether under the provisions of Sections 144 and 146 (4) of the Bankruptcy Act a Bankruptcy Court must

relinquish the jurisdiction conferred upon it by Chapter X because of a mere showing that there is pending in the state court an equity foreclosure seeking solely a sale of the property where the only relief that the State Court is required to grant is a sale of the property to the highest bidder under foreclosure decree, and where there is a conflict between creditors, and it appears the creditors received no notice of the foreclosure, were not a party to said proceeding and the sole right of action is vested in the indenture trustee under the trust deed, and that creditors do not have an absolute right of intervention in said state foreclosure proceedings.

Statutes Involved.

The statutes involved are the following provisions of the Bankruptcy Act.

Section 144 (11 U.S.C. § 544): "If an answer filed by any creditor, indenture trustee, or stockholders shall controvert any of the material allegations of the petition, the judge shall, as soon as may be, determine, without the intervention of a jury, the issues presented by the pleadings and enter an order approving the petition, if satisfied that it complies with the requirements of this chapter and has been filed in good faith and that the material allegations are sustained by the proofs, or dismissing it if not so satisfied."

Section 146 (11 U.S.C. § 546): "Without limiting the generality of the meaning of the term 'good faith', a petition shall be deemed not to be filed in good faith if—* * * (4) a prior proceeding is pending in any court and it appears that the interests of creditors and stockholders would be best subserved in such prior proceeding."

STATEMENT.

The litigants are holders of the debtor's second mortgage bonds, of which $200,800 were outstanding on December 1, 1944, the date of maturity. There is also a first mortgage of $26,000, which is not in default. The capital stock of the debtor, consisting of 2,160 shares of no par common stock, is wholly owned by bondholders as a result of a prior State Court reorganization under which stock control became incident to bond ownership, and by which proportionate interests in stock passes with a transfer of bonds. The principal asset of the debtor is an apartment building in Chicago, Illinois (R. 3, 10, 11, 26).

The bonds were issued pursuant to a trust indenture naming The Trust Company of Chicago as trustee, and empowering holders of 51% of the outstanding bonds to direct and control the acts of the trustee, and to remove the latter at their pleasure (R. 25, 86). The objecting creditor owns more than 51% of the issue. Under the indenture, the debtor waived all rights of redemption in the event of a foreclosure sale (R. 30).

In his statement under Section 210 of the Bankruptcy Act (11 U. S. C. A. §610), Seifried apparent objector to the reorganization petition has listed himself as the holder of $132,800 of bonds acquired between October 9, 1944, and December 19, 1944, which is 66.1% of the outstanding issue (R. 13-14). It appears, however, that the real owner of these securities is one Howard F. Bishop, a Chicago attorney, who purchased them in the name of Seifried at an average price of $68 as against a par value of $100 (R. 24, 32, 47).

On December 2, 1944, one day after maturity and default, Bishop, then holder of more than 51% of the outstanding bonds, and also having a controlling interest in the stock, purporting to act as attorney for Seifried, called upon an officer of the indenture trustee with a prepared bill of foreclosure, secured its proper execution, and arranged for the employment of his law firm as attorney for the trustee (R. 27-29, 35-38). Immediately thereafter, a bill of foreclosure was filed in the Superior Court of Cook County, Illinois, to which the only parties were the indenture trustee as plaintiff and the debtor as defendant. No notice was given to the bondholders of the filing of said proceedings, and the answer of Seifried admits said cause is now ready for decree (R. 11).

It further appears that at the time Bishop as attorney for his nominee, Lester Seifried, made the demand upon the indenture trustee, the Trust Company of Chicago to commence foreclosure proceedings, he failed to disclose to said indenture trustee for whom he proposed to act (as attorney) that he had a personal interest in the ownership of said securities and had, in fact, personally paid for all securities listed in said demand (R. 37).

On December 9, 1944, while the bill of foreclosure was pending, petitioners, minority holders of $5700 of the second mortgage bonds, filed a creditors' petition for reorganization of the debtor under Chapter X of the Bankruptcy Act, noting *inter alia*, the pendency of the bill of foreclosure, and alleging that by virtue of increased real estate taxes, increased operating and labor costs, and rent ceiling, the debtor's assets could not presently be sold at a price fairly commensurate with their real value, that a sale would result only in great loss to the debtor and its creditors, and that relief could be obtained only by a Chapter X reorganization modifying and altering the rights of the secured creditors (R. 2-8). Seifried filed an answer denying that the petition had been filed in good

faith, alleging that reorganization was impossible, and urging that the interests of all bondholders were fully safeguarded in the state court proceedings (R. 9-12). At the hearing on the "good faith" issue it appeared that Bishop had not resorted to the state court foreclosure proceeding pursuant to any plan or program for reorganization, but was in fact seeking a sale of the property under foreclosure decree pursuant to the prayer of the complaint (R. 31). Under the indenture he would be in a position to apply his bonds in payment of the purchase price and secure title free from possibility of redemption by the debtor (R. 43, 73). No opposition to the foreclosure was offered by the debtor. Seifried and his "attorney", Bishop, had been associates in a number of real estate ventures (R. 46 *et seq.*), and the district judge was warranted in inferring that they might wish to use their recently acquired bonds to aid them in acquiring the property as cheaply as possible, and that their own self interest conflicted with that of other bondholders.

On cross-examination it was disclosed that neither Bishop nor the indenture trustee had at any time ever discussed any plan of reorganization in the state court (R. 37).

The answer of Seifried challenged the jurisdiction of the Federal Court and asserted that ample relief could be had in the State Court. By reason of the fiduciary capacity which Bishop and the indenture trustee occupied to all bondholders, we deemed it important to inquire of said fiduciaries, what relief they would obtain for bondholders in the State Court. We therefore quote from the record:

> Mr. Ratner: (representing creditors in the Chapter X proceeding.)
>
> Q. Now, tell me, Mr. Bishop, what is the relief that the bondholders, other than yourself, are going to receive in the State Court?
>
> * * * * *

The Witness: I have been advised by Mr. Swanstrom, who has looked into this matter.

Q. Very well, go ahead.

A. I have been advised by him that under the Bryn Mawr Building case, which I have not gone into in detail, or Bryn Mawr Corporation, that that can be done. I haven't paid any particular attention.

Q. What can be done?

A. That complete relief can be had in the State Court.

Q. What relief?

A. Complete relief, plan, or anything else. I haven't gone into the details of that.

Q. Why hasn't that been submitted to the State Court, then?

A. I couldn't tell you (R. 31-32).

Mr. Townsend, President of the Trust Company of Chicago who was the Indenture Trustee, and without whom a Plan of Reorganization could not be presented testified:

Q. Did you discuss with Mr. Bishop at the time of his demand, or at any other time any Plan of Reorganization?

A. No sir.

Q. Did he discuss that with you?

A. No sir. (R. 37).

The District Judge entered an order on January 5, 1945, approving the petition as having been filed in good faith and appointing a trustee for the debtor and its property (R. 16-21). The instant appeal followed.

Specifications of Errors To Be Urged.

The Circuit Court of Appeals erred:

1. In holding that the creditor's petition for reorganization under Chapter X of the Bankruptcy Act was not filed in good faith.

2. In directing the District Court to dismiss the petition.

Reasons for Granting the Writ.

Many trust deeds involving large properties vest the sole right of action to commence a foreclosure in the indenture trustee. Under such a trust deed in an Illinois foreclosure proceeding the bondholders are not parties to said action, receive no notice of said proceeding and do not have an absolute right of intervention in said foreclosure proceeding. Many foreclosure proceedings involving bond issues where the sole right of action is vested in the indenture trustee have been and are being filed annually in the Illinois state courts. Does the mere pendency of such a proceeding in the name of an indenture trustee to which proceeding bondholders are not a party and have no absolute right of intervention deprive within the meaning of Section 146 (4) the minority bondholders from seeking the protection of Chapter X where a conflict exists between bondholders? If this be true it would result in a race between bondholders as to which forum they deemed best suited for their particular objective. In the instant case there was a conflict between the minority bondholders and the dominant bondholder who was a fiduciary, and as such, his personal interest was antagonistic to the interest of minority bondholders. The bondholders had no notice or voice in the conduct of said foreclosure. The majority bondholder dominated said proceeding and actually conducted said proceeding as the attorney for the indenture trustee. The majority bondholder had the right under the trust deed to remove the indenture trustee at any time. Only in the federal court in a proceeding under Chapter X where each step of the proceeding is subject to the closest scrutiny and upon notice to all bondholders and the approval of the court could the minority bondholders be protected.

We believe the Circuit Court of Appeals in the instant case has misapplied the decision in the case of *Marine Harbor Properties, Inc.*, 317 U. S. 78 (1942) by giving it the effect of excluding Federal jurisdiction because of the mere pendency of a prior State Court foreclosure. The District Judge knew the benefits to be obtained under Chapter X, and took judicial notice of the statutes of the State of Illinois governing the relief that could be obtained in that forum, and the inadequacies incident to State Court foreclosure proceedings. He knew that the majority bondholder could compel a sale of the property in said foreclosure for under the Illinois law the bondholder is entitled to his pro-rata cash distribution under a foreclosure proceedings. He also knew that there was a conflict of interest among creditors, as disclosed by the record and that the foreclosure proceeding was under the very control of the person who with selfish motives could be quilty of abuse. Under such circumstances the District Judge determined that the interests of all creditors could be *better subserved* in the Federal Court. Unless the words "better subserved" are given definite meaning and consideration the very purpose and intention of Congress, in including them in Chapter X would be nullified. It therefore becomes of vital importance to the administration of Chapter X to determine whether it was the intention of the Supreme Court under the Marine Harbor Properties decision, to give the same effect to Section 146 (4) as the Circuit Court of Appeals has in the instant appeal.

PRAYER.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court, commanding said Court to certify and send to this Court on

a day to be designated a full and complete transcript of the record and of all proceedings of the Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; and that the order of the Circuit Court of Appeals for the Seventh Judicial Circuit reversing the order of the District Court be reversed and remanded and that petitioner be granted such other and further relief as may seem proper.

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